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IN THE
Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL., *Petitioners*,
v.
SANDRA K. OMAR AND AHMED S. OMAR, AS NEXT FRIENDS OF SHAWQI AHMAD OMAR, *Respondents*.

MOHAMMAD MUNAF, ET AL., *Petitioners*,
v.
PETE GEREN, SECRETARY OF THE ARMY, ET AL., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF AMICI CURIAE OF THE CONSTITUTION PROJECT AND THE RUTHERFORD INSTITUTE IN SUPPORT OF THE HABEAS PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are two not-for-profit, public-interest organizations that share an interest in preserving the historic right of American citizens held in American custody to invoke the Great Writ of habeas corpus. Both groups work to safeguard constitutional rights, and seek to preserve the fundamental point of law that an American citizen cannot be denied habeas corpus simply because he is delivered into American custody by a multinational military force led by the United States.[1]

Amicus the Constitution Project ("the Project") is a bipartisan organization that promotes and defends constitutional safeguards. The Project brings together legal and policy experts from across the political spectrum to promote consensus solutions to pressing constitutional issues. After September 11, 2001, the Project created its Liberty and Security Committee, a blue-ribbon committee of prominent Americans, to address the importance of preserving civil liberties as we work to protect our Nation from international terrorism. The committee develops policy recommendations on such issues as the use of military commissions and governmental surveillance policies, and emphasizes the need for all three branches of government to play a role in preserving constitutional rights.

Additionally, the Project's War Powers Committee released a report in June 2005 entitled *Deciding to*

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[1] Pursuant to Supreme Court Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a); the requisite consent letters have been filed with the Clerk of this Court.

Use Force Abroad: War Powers in a System of Checks and Balances,[2] analyzing the respective powers of all three branches of government during wartime. The Project's Courts Committee also conducts public education on the importance of an independent Judiciary and cautions against legislation or Executive Branch practices that would limit the jurisdiction of federal courts.

In March 2007, the Project issued a *Statement on Restoring* Habeas Corpus *Rights Eliminated by the Military Commissions Act*, signed by a bipartisan group of approximately 40 political leaders, policy experts, and legal scholars. The signatories to the statement reaffirmed that the Great Writ serves as the preeminent safeguard of individual liberty and separation of powers by supplying "the critical, fail-safe procedure to ensure that the executive has complied with the Constitution and laws of the United States."[3]

Amicus the **Rutherford Institute** ("the Institute") is an international civil-liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated. The Institute also strives to educate the public about constitutional and human-rights issues. During its 25-year history, attorneys affiliated with the Institute have represented numerous parties before the U.S. Supreme Court. The Institute has also filed briefs *amicus*

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[2] The Project's report is available online at http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad.pdf.

[3] The Project's Statement and the attendant list of signatories is available at http://www.constitutionproject.org/pdf/MCA_Statement.pdf.

curiae with this Court in cases dealing with critical constitutional issues arising from the current efforts to combat terrorism. *See Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006); *Rasul* v. *Bush*, 542 U.S. 466 (2004); *Rumsfeld* v. *Padilla*, 542 U.S. 426 (2004).

Owing to their belief in the importance of the fundamental right of habeas corpus enjoyed by all American citizens, the *amici* thus have a keen interest in the principle of law that this Court announces in resolving these cases. That is because the novel and sweeping rule that the Government advances here threatens to undermine the historic right of American citizens to challenge in federal court the lawfulness of their detention by their own government. If left unchecked, the Executive's proclaimed detention power would authorize the Government to detain indefinitely—and unlawfully—American citizens held in American custody, so long as the Government dressed up that detention with a multinational-forces fig leaf. But this Court has rejected such formalisms in the past; it should do so again here. The liberty promised in the Constitution—and protected by the Great Writ—should not turn on such preciously fine (and practically meaningless) distinctions.

SUMMARY OF ARGUMENT

Our Nation's abiding commitment to individual liberty is tested during grave times like these, when our military is engaged in multiple wars abroad against stateless enemies trying to inflict harm at home. But while military and political priorities inevitably shift and adapt to these challenges, the Constitution's commitment to liberty remains constant. That consistency ensures that we "preserve our commitment at home to the principles for which we fight abroad." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality op.). For "[i]t would indeed be ironic if, in the name of national defense, we would

sanction the subversion of one of those liberties * * * which makes the defense of the Nation worthwhile." *United States* v. *Robel*, 389 U.S. 258, 264 (1967).

But as our military fights international terrorism overseas in Iraq to defend our freedoms, at home the Government asserts that the federal courts are without jurisdiction to entertain writs of habeas corpus filed by American citizens who have been detained abroad during that military effort. The reason: These citizens' custodian—a Lieutenant Colonel in the U.S. Army, answerable exclusively to a U.S. chain of command—is formally part of a U.S.-led (and dominated) multinational force authorized by the United Nations.

Thus, in these two cases, the Government threatens to unlawfully and indefinitely confine two American citizens, Shawqi Omar and Mohammed Munaf (the "habeas petitioners"), without affording them access to the basic procedural safeguard that the Framers fashioned to challenge government detention: the Great Writ of habeas corpus. This move cuts deeply against tradition. Both the right at stake and the attendant procedural remedy for its violation have ancient roots extending into our English common-law heritage, are expressly protected in our Constitution, and have been jealously guarded by courts—including this one—for centuries.

Given the United States' ever increasing involvement in international agreements, multinational military efforts, and security compacts, the jurisdictional rule championed by the Government would radically limit federal courts' habeas jurisdiction. This Court should not embrace such a boundless and easily manipulated rule. Instead, it should adopt a firm and easy-to-apply rule that puts to practice this Court's precedents and the Great Writ's heritage: American citizens are entitled to challenge their detention in federal court whenever they are held in

the custody of American officials who, as here, are answerable to a U.S. chain of command—regardless of whether those U.S. officials are participating in multinational military operations.

This rule reflects the historically expansive interpretation that this Court has afforded the habeas statute's "in custody" requirement. For example, this Court has emphasized that a petitioner is "in custody" whenever the custodian is a government official capable of producing the petitioner before the habeas court. Under this easily administered rubric, Omar and Munaf are held in the custody of U.S. authorities capable of producing them before the habeas courts. Notwithstanding their participation in multinational military operations in Iraq, our military forces holding Omar and Munaf there answer exclusively to an American—not multinational—chain of command.

This Court has indeed assumed jurisdiction over habeas petitions in the past that stemmed from American participation in multinational military efforts, including World War II, the Korean War, and the ongoing efforts to combat international terrorism. Most notably, in *Hamdi* this Court addressed the merits of a habeas petition filed by another American citizen who landed in American custody as a result of U.S. participation in multinational military operations. Not one Justice concluded, or even hinted, that federal courts might be deprived of jurisdiction over Hamdi's habeas petition simply because he was captured and initially detained in Afghanistan by military forces participating in Operation Enduring Freedom, a coalition of forces from the United States, the United Kingdom, and the Northern Alliance. That distinction did not matter in *Hamdi*; it should not matter here.

In support of its multinational-force limitation on federal courts' habeas jurisdiction, the Government

invokes one—and only one—case: *Hirota* v. *MacArthur*, 338 U.S. 197 (1948). But that terse per curiam opinion—nine sentences in all—does not support the expansive jurisdictional limitation the Government claims. Rather, the case was narrowly decided on the specific circumstances involved there, including circumstances not present here: Unlike the habeas petitioners in these cases, the petitioners in *Hirota* were foreign citizens who improperly invoked this Court's appellate jurisdiction to launch a collateral attack on their military-tribunal convictions.

But the Government's proposed jurisdictional limitation is not only unsupported by the one case that it cites in support of it. The limitation also conflicts with this Court's longstanding recognition that American citizens held in American custody may, by virtue of their citizenship, challenge the lawfulness of their detention by petitioning federal courts for release. The Court most recently reaffirmed this rule in *Hamdi*, which, just like these cases, involved the Executive's detention of an American citizen by American authorities as a result of U.S. participation in multinational military operations.

The multinational-force limitation on federal courts' habeas jurisdiction that the Government advances would also create perverse incentives for the Executive to detain American citizens under the auspices of an international arrangement to obtain the unbridled discretion to determine whether to recognize their constitutional rights *vel non*. That discretion would also allow the Government to escape this Court's core holding in *Hamdi*: The Executive would be under no obligation to provide enemy combatants any measure of due process if it could entirely escape federal court jurisdiction simply by claiming its challenged actions were taken in accordance with some multinational arrangement.

Nor do separation-of-powers principles support the jurisdictional limitation that the Government claims is mandated by *Hirota*. Just the opposite. The Government's rule would consolidate within the Executive Branch power that is constitutionally vested in the Judicial Branch. It would let the Executive—exercising its Article II powers—detain U.S. citizens abroad but then insulate that decision from Article III review by unilaterally opting to participate in a multinational military operation. But a U.N. Resolution or armed-forces agreement cannot—any more than an act of Congress—provide a "blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 542 U.S. at 536 (plurality opinion).

ARGUMENT

I. UNITED STATES COURTS HAVE JURISDICTION TO REVIEW HABEAS CLAIMS BY AMERICAN CITIZENS HELD "IN THE CUSTODY" OF AMERICAN OFFICIALS PARTICIPATING IN THE MULTINATIONAL FORCE AT ISSUE HERE.

A. American Citizens Enjoy A Historic And Fundamental Liberty Interest In Freedom From Arbitrary Detention By Their Own Government That Is Protected By The Writ Of Habeas Corpus.

The Government's asserted multinational-force limitation on federal courts' habeas jurisdiction threatens to deprive the habeas petitioners here of their fundamental right to be free from arbitrary and indefinite Executive detention that was recognized in England centuries ago, is part of our common law heritage, is embedded in our Constitution, and has been repeatedly reaffirmed in this Court's jurisprudence.

1. Since ancient times, the Great Writ has played an essential role in a free society by protecting the individual's vital liberty interest in being free from arbitrary and unlawful imprisonment by his or her own government. As William Blackstone explained centuries ago, "confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." 1 W. Blackstone, *Commentaries on the Laws of England* 132 (1765) [hereinafter Blackstone]. The Founders of this Nation knew the danger of which Blackstone spoke. *See Federalist No. 84* (Hamilton); *see Hamdi*, 542 U.S. at 555 (Scalia, J., dissenting) (noting that Hamilton quoted this "very passage" from Blackstone). Alexander Hamilton, in defending our Constitution, described "the practice of arbitrary imprisonment" as a "favourite and most formidable instrument of tyranny." *Federalist No. 84.*

This Court has also consistently recognized "the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law." *Hamdi*, 542 U.S. at 531; *see also Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). As this Court has only recently explained, "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed or exiled save by the judgment of his peers or by the law of the land." *Rasul*, 542 U.S. at 474 (quotation marks omitted).

2. The recognition of this fundamental right—being free from unlawful government detention—is no less historic than the recognition of the proper

remedy for a violation of it: The Great Writ of habeas corpus, which has long stood as "the symbol and guardian of individual liberty." *Peyton* v. *Rowe*, 391 U.S. 54, 58 (1968). That writ, as this Court has recognized, "is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris* v. *Nelson*, 394 U.S. 286, 290-291 (1969). And as the procedural vehicle providing "a swift and imperative remedy in all cases of illegal restraint or confinement," the writ "is of immemorial antiquity." *Williams* v. *Kaiser*, 323 U.S. 471, 484 n.2 (1945) (quotation marks omitted).

The Great Writ traces its origins to our English forbears, who fashioned it to protect individuals from government abuses of power. *See id.* (noting an "instance of its use occurring in the thirty-third year of Edward I"). As this Court has explained, "[t]he judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint." *Rasul*, 542 U.S. at 474. And "after a long struggle" with the Crown, the writ of habeas corpus was "firmly guaranteed [to English subjects] by the famous Habeas Corpus Act of May 27, 1679." *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868). Blackstone described the passage of this Act as "another [M]agna [C]harta," 3 Blackstone 135, tailor-made "for the better securing of the liberty of the subject," *Ex parte Yerger*, 75 U.S. at 95. In time, the habeas writ came to be "the most celebrated writ in the English law," 3 Blackstone 129, and it has yet to lose its allure: For centuries it has been "esteemed the best and only sufficient defence of personal freedom." *Ex parte Yerger*, 75 U.S. at 95.

From our Nation's founding, the writ has been entrenched "deep into the Genius of our common law." *Id.* For "[b]y the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement

* * * was * * * an integral part of our common-law heritage." *Preiser* v. *Rodriguez*, 411 U.S. 475, 485 (1973). That common-law heritage was later honored with a privileged place in our Nation's founding document; it is "the only common law writ to be explicitly mentioned" in the Constitution. *Hamdi*, 542 U.S. at 558 (Scalia, J., dissenting). Thus, the Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

Soon after the Constitution was ratified, the federal courts were entrusted with carrying out the Suspension Clause's command. As Chief Justice Marshall has explained, the First Congress, "[a]cting under the immediate influence of this injunction[,]" gave "this great constitutional privilege * * * life and activity." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807). The Judiciary Act of 1789, which constitutes "a contemporaneous exposition of the constitution," *Cohens* v. *Virginia*, 19 U.S. (6 Wheat) 264, 420 (1821), authorized federal courts to grant the writ of habeas corpus in any case of detention "under or by colour of the authority of the United States." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82.

From that day forward, the writ of habeas corpus has operated as this Nation's "highest safeguard of liberty." *Lonchar* v. *Thomas*, 517 U.S. 314, 322 (1996) (quotation marks omitted). Accordingly, "this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace." *Rasul*, 542 U.S. at 474. And it is no less vital today during the ongoing efforts to combat terrorism than it has been in the past: Even "now, in the twenty-first century, the writ continues to protect fundamental rights as the

United States confronts the challenge of international terrorism." *Omar* v. *Harvey*, 479 F.3d 1, 5 (D.C. Cir. 2007).

B. That An American Citizen Is Held In American Custody As A Result Of American-Led Multinational Military Operations Does Not Deprive A Court Of Jurisdiction Over A Writ Of Habeas Corpus.

"The turnkey of the habeas statute is the requirement of custody." *Abu Ali* v. *Ashcroft*, 350 F. Supp. 2d 28, 45 (D.D.C. 2004).[4] It has long been the rule that this critical "in custody" requirement is satisfied whenever a person is held by an American official, provided that the official has the ability to produce the person before the habeas court. That is indisputably the case here. And this Court's decisions since World War II make clear that the fact that the habeas petitioners in these cases came into American custody as a result of multinational military operations does not alter that calculus.

1. From its inception, courts have given the Great Writ of habeas corpus a broad reach. *See* 3 Blackstone 131 ("[T]he great and efficacious writ in *all manner* of illegal confinement, is that of habeas corpus.") (emphasis added). This practice is true to the writ's high office: "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris*, 394 U.S. at 291. As Justice Holmes explained, "habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in

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[4] *See* 28 U.S.C. § 2241(c) ("The writ of habeas corpus shall not extend to a prisoner unless * * * [h]e is in custody under or by color of the authority of the United States * * * or * * * [h]e is in custody in violation of the Constitution or laws or treaties of the United States").

from the outside * * * and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." *Frank* v. *Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting); *see also Harris*, 394 U.S. at 291 ("The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers.").

Accordingly, federal courts have given the habeas statute's "in custody" requirement a broad construction. *See, e.g.*, *Maleng* v. *Cook*, 490 U.S. 488, 492 (1989) ("[W]e have very liberally construed the 'in custody' requirement for purposes of federal habeas."). As this Court has emphasized, "we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley* v. *Municipal Court, San Jose Milpitas Judicial Dist., Santa Clara County*, 411 U.S. 345, 350 (1973).

Consistent with a flexible approach designed to serve the core purpose of the habeas statute—to free citizens unlawfully imprisoned by their government—this Court over the years has indeed steadily expanded the scope of the statute's "in custody" requirement. *See Hensley*, 411 U.S. at 351 ("The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberties."). As a result, "the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody." *Jones* v. *Cunningham*, 371 U.S. 236, 239 (1963). Thus, this Court has held that a petitioner remained in state custody despite being released "on personal recognizance," *Justices of Boston Mun. Court* v. *Lydon*, 466 U.S. 294, 300

(1984); that a petitioner remained in custody of the Virginia Parole Board despite being paroled, *see Cunningham*, 371 U.S. at 243; and that a petitioner imprisoned in Alabama nevertheless remained in Kentucky's custody, *see Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973).

Underlying this robust expansion of the habeas statute's "in custody" requirement is the basic principle that a person is "in custody" whenever the custodian is a government official with the ability to produce the person before the habeas court. *See* 28 U.S.C. § 2243 ("The writ * * * shall be directed to the person having custody of the person detained."); *Peyton*, 391 U.S. at 58 (explaining the habeas writ "assures * * * that a prisoner may require his jailer to justify the detention under the law."). As this Court explained before the turn of the last century, the habeas statute "contemplate[s] a proceeding against some person who has the immediate custody of the person detained, *with the power to produce the body of such person before the court or judge*, that he may be liberated if no sufficient reason is shown to the contrary." *Wales* v. *Whitney*, 114 U.S. 564, 574 (1885) (emphasis added); *see also Ex parte Endo*, 323 U.S. 283, 306 (1944) ("The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer.") (quotation marks omitted). Nearly a century later, the Court again held that "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Braden*, 410 U.S. at 494-495. And just a few years ago, this Court reiterated that the statutory custodian is " 'the person' *with the ability to produce the prisoner's body before the habeas court.*" *Rumsfeld* v. *Padilla*, 542 U.S. 426, 435 (2004) (emphasis added) (quoting 28 U.S.C. § 2243). Thus, the ultimate touchstone of the habeas statute's "in

custody" requirement is the ability of the designated official to produce the petitioner before the habeas court.

2. Under this straightforward test, the habeas petitioners here are plainly held in the custody of American officials with the power to produce them before the habeas courts. After all, it is undisputed that the petitioners are being held at detention facilities run by United States forces operating in Iraq as part of Multi-National Force Iraq—a.k.a., MNF-I. *See* Gov. Br. 5 ("Since his capture, Omar has remained in the custody of members of the United States armed forces operating as part of the MNF-I."); *see also Munaf* v. *Geren*, 482 F.3d 582, 491 (D.C. Cir. 2007) (Munaf is "being held, in Iraq, by United States military personnel serving as part of [MNF-I]"). And the MNF-I "operates under the unified command of United States military officers." Gov. Br. at 2 (quotation marks omitted).

Even while American military personnel participate in MNF-I, they answer only to a United States chain of command ultimately running to the Commander-in-Chief. *See Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force-Iraq*, at 3 (2004). Thus, the United States military personnel detaining the petitioners in Iraq answer to no authority other than United States military personnel and civilian officials. *See Nomination of General George W. Casey, Jr., for Reappointment to the Grade of General & to be Commander, Multinational Force-Iraq: Hearing Before the S. Comm. On Armed Serv.*, 108th Cong. (June 24, 2004) (statement of Gen. George W. Casey, Jr.).

This Court's cases make clear that American citizens so held may petition federal courts for release; that they were placed in American custody by an American-led multinational military force makes no

difference. The Government's claim that federal courts lack jurisdiction in such circumstances would indeed mire them in the very statutory formalism that they have long eschewed.

3. In keeping with the expansive reading of the habeas statute's "in custody" requirement courts historically have not hesitated to assume jurisdiction over writs of habeas corpus imbued with a multinational character like those at issue in these cases. Three of this Court's decisions in particular gainsay the Government's assertion that federal courts are bereft of jurisdiction to entertain writs of habeas corpus involving multinational military operations. These decisions date back to the middle of the last century and involve this Nation's participation in seminal multinational conflicts—World War II, the Korean War, and the ongoing operations to combat terrorism.

First, in *Madsen* v. *Kinsella*, 343 U.S. 341 (1952), this Court exercised jurisdiction over a writ of habeas corpus filed by an American woman who had been convicted under the German Criminal Code by the "United States Court of the Allied High Commission" of murdering her husband, an Air Force lieutenant, during the U.S.-led occupation of Germany following World War II. *Id.* at 343. That court represented a hybrid of U.S. and multinational authority. On the one hand, it was chartered under a law issued by the "Allied High Commission" in 1949, *id.* at 344-345 & n.3, and, as an occupation court, was "designed especially to meet the needs of law enforcement in that occupied territory" and applied "the German Criminal Code largely as it was theretofore in force." *Id.* at 355-356.

But on the other hand, its existence was rooted to an international framework established by the four Allied powers. Following the German surrender in May 1945, the Allied powers asserted supreme

authority over Germany and agreed that "authority was to be wielded unilaterally by the Commanders-in-Chief in their respective zones of occupation." Elmer Plischke, *History of the Allied High Commission for Germany: Its Establishment, Structure and Procedures* 1 (1951). And it was under this multinational delegation of authority that General Eisenhower issued Ordinance No. 2 establishing military-occupation courts. *See* W. Friedman, *The Allied Military Government of Germany* 300-303 (1947).

Despite the multinational dimension to *Madsen*, this Court did not dismiss the petition for want of jurisdiction. To the contrary, the Court resolved the case on the merits: It held that "the jurisdiction of the United States Courts of the Allied High Commission for Germany to try petitioner being established, the judgment of the Court of Appeals affirming the discharge of the writ of habeas corpus for petitioner's release from custody is affirmed." *Madsen*, 343 U.S. at 362.

Second, in *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955), this Court again entertained a writ of habeas corpus arising from American participation in a multinational military effort. The petition at issue was filed on behalf of an American citizen—Toth—detained in Korea for crimes committed during American military operations there. *See id.* at 13. After being discharged from the Air Force, Toth was arrested in Pittsburgh and transported back to Korea to be tried for murder and conspiracy to commit murder before a court-martial. *Id.* at 13 & n.3. His petition challenged the constitutionality of the Government's effort to subject him to a court-martial after being discharged from military service.

Again, the Court did not dismiss Toth's petition for lack of jurisdiction; it decided his case on the merits. *See id.* at 23. Granting Toth's writ, the Court held that "Congress cannot subject civilians like Toth to

trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution." *Id.*

As was the case in *Madsen*, however, the United States' participation in the Korean War was under the auspices of international authority and as a member of a multinational military force. Indeed, much like the present conflict, the United Nations had passed resolutions authorizing multinational military operations there. [5]

Third, and most recently, in *Hamdi* this Court assumed jurisdiction over a writ of habeas corpus involving circumstances very similar to those underlying the petitions involved in these cases. Yasir Hamdi—an American citizen—was captured and detained in Afghanistan as part of Operation Enduring Freedom, a multinational military effort undertaken by the United States, the United Kingdom, and the Northern Alliance. For all intents and purposes, that multinational force operated no differently from the multinational force in Iraq that captured and detained the petitioners in these cases—both of whom are also American citizens. *See* 542 U.S. at 510 (explaining that Hamdi was "seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government," not American forces).

Once again, the fact that Hamdi was captured during a multinational military operation did not operate as a jurisdictional bar to the Court's consideration of his writ of habeas corpus. The Court addressed the merits of Hamdi's petition, holding that enemy combatants are entitled to a "meaningful opportunity to contest the factual basis for [their]

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[5] *See* S.C. Res. 84, U.N. Doc. S/RES/84 (July 7, 1950); S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950).

detention before a neutral decisionmaker." *Id.* at 509 (plurality op.). While the Court was divided over the resolution of the merits of Hamdi's petition, not a single Justice doubted that the Court had jurisdiction to entertain it in the first place. *See id.* at 539 (plurality op.); *see id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 554 (Scalia, J., dissenting); *id.* at 585 (Thomas, J., dissenting).

Instead of casting doubt on the right of an American citizen held in American custody by virtue of multinational military operations to petition a federal court for a writ of habeas corpus, the plurality "reaffirm[ed] * * * the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law." *Id.* at 531. As the plurality explained, "the interest in being free from physical detention by one's own government * * * is the most elemental of liberty interests." *Id.* at 529. The plurality also made clear that availability of this right did not turn on where Hamdi was held, be it Afghanistan, Cuba, or the United States. *Id.* at 524 (explaining that "it is not at all clear why that should make a * * * difference").

These three cases—*Madsen*, *Toth*, and *Hamdi*—confirm that this Court has never endorsed Executive attempts to limit the Judiciary's habeas jurisdiction based on American participation in multinational military efforts. They also demonstrate that this Court has continually accepted jurisdiction over writs of habeas corpus arising out of this Nation's participation in multinational military operations.[6]

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[6] These cases are consistent with historic practice. During the Seven Years' War, for example, the King's Bench entertained, and ultimately granted, a writ of habeas corpus filed on behalf of Robert Brownless, the master of a Greenland Fishery

For if there were any such limitation, each of these cases could have—and would have—been dismissed for lack of jurisdiction.

The Government nevertheless finds such a limitation in an obscure per curiam decision that this Court itself has apparently never before seen fit to rely upon for any substantive proposition of law. *See Omar*, 479 F.3d at 7. The case does not remotely support the Government's asserted limitation.

C. *Hirota* v. *MacArthur* Does Not Control The Question Presented.

The Government relies upon a single case to support the novel proposition that federal courts lack jurisdiction to entertain writs of habeas corpus filed by American citizens delivered into American custody by a multinational military force led by the United States: *Hirota*. *See, e.g.*, Gov. Br. 21 ("The basic teaching of *Hirota* calls for dismissal of these cases."). But this Court's brief three-paragraph, per curiam opinion in *Hirota* simply cannot bear the weight that the Government invites this Court to place on it: *Hirota* announces *no* rule of general applicability, let alone the surprising and dangerous proposition that the Government says it does.

Hirota's holding is encapsulated in a single sentence: "*Under the foregoing circumstances* the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgment and sentences imposed on these petitioners and *for this reason* the motion for leave to file petitions for writs of habeas corpus are denied." 338 U.S. at 198

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ship, who had been impressed into service in the Royal Navy. *See* Markus Eder, *Crime and Punishment in the Royal Navy of the Seven Years' War* 29-35 (Ashgate 2004). That conflict, like the present one, had multinational dimensions, with Great Britain joining in a coalition that included Prussia.

(emphasis added). But the Court declined to articulate which of the "circumstances" that it described in the "foregoing" two paragraphs of the opinion it actually found to control the outcome. *See id.* at 197-198.

Yet, whatever the critical "foregoing circumstances" were that motivated the Court's holding, the court's recitation included a particularly notable distinguishing fact not involved here. Unlike the American petitioners involved in these cases, the petitioners in *Hirota* were "all residents and citizens of *Japan*." 338 U.S. at 197 (emphasis added). Moreover, the Court's decision seems to reflect the unique procedural nature of the challenge, which again was quite different from these cases: Before seeking relief in a district court, the *Hirota* petitioners invoked the Court's appellate jurisdiction to collaterally attack the judgments of "[t]he military tribunals * * * set up by General MacArthur as the agent of the Allied Powers." *See id.*

In any event, it is clear that the Court's modest and largely unexplained holding in *Hirota*, which was expressly based on the particular circumstances involved in that case, cannot "establish[ ] that United States courts lack jurisdiction to review the detention of individuals held abroad pursuant to international authority." Gov. Br. 17. For there is not "anything in the [*Hirota*] opinion hold[ing] that federal courts lack habeas jurisdiction whenever, as the government insists, American officials detaining a petitioner are functioning as part of a multinational force." *Omar*, 479 F.3d at 7. Far from announcing any such rule, the *Hirota* Court was careful to articulate "*no* general legal principle at all" to ensure that the case would be decided on the "narrowest possible grounds." *Id.* (emphasis added).

Even the *Munaf* court, which ultimately found jurisdiction over Munaf's petition wanting, declined

to "suggest that [it] [found] the logic of *Hirota* especially clear or compelling, particularly as applied to American citizens." *Munaf v. Geren*, 482 F.2d at 584.[7] Rather than embrace the Government's reading of *Hirota*, the court there simply—if incorrectly[8]—concluded that *Hirota* held that "the fact of a criminal conviction in a non-U.S. court is a fact of jurisdictional significance under the habeas statute." *Id.*

In claiming that *Hirota* establishes a categorical ban on habeas jurisdiction whenever an American citizen is held by a multinational force, the Government stretches that modest per curiam decision beyond all recognition. The Government takes a cursory opinion—which was expressly limited to its unique circumstances, resolved without announcing any general rule of decision, and involved no American citizens—and converts it into an expansive warrant for the Executive Branch to detain Americans abroad without any judicial recourse whenever the United States is involved in a multinational conflict. *Hirota* does not support that expansive view of Executive power.

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[7] The third judge of the *Munaf* panel—Judge Randolph—found that the court had jurisdiction to entertain the petition and concurred in the judgment for a different reason. In reaching that conclusion, Judge Randolph actually cited *Hirota* for the proposition that "[t]he critical considerations are that Munaf is an American citizen and that he is held by American forces overseas." *Munaf*, 482 F.2d at 585 (Randolph, J., concurring in the judgment). That reading of the case comports with this Court's precedents.

[8] The Government and the habeas petitioners agree that a jurisdictional rule that allows citizens to petition federal courts to challenge their detention until they are convicted by a foreign court makes no sense. *See, e.g.*, Gov. Br. 28-29.

D. The Government's Proposed Rule Of Decision Conflicts With This Court's Decisions.

Not only does the Government's limitation on habeas jurisdiction find no support in this Court's precedent; it squarely conflicts with it. This Court has long recognized that federal courts have jurisdiction to entertain writs of habeas corpus filed by American citizens to challenge the lawfulness of their detention by American officials *precisely because they are American citizens.*

Merely two years after this Court decided *Hirota*, it decided *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950). There, the Court held that federal courts were without jurisdiction to entertain writs of habeas corpus filed by "enemy aliens overseas"—specifically, Germans imprisoned in Germany. *Id.* at 765. But in articulating the breadth of its holding, the Court carefully limited its scope. It concluded that American citizens were outside its embrace because "[t]his Court long ago extended habeas corpus" to citizens held outside the United States. *See id.* at 769. The Court explained the privileged role of American citizenship in the jurisdictional inquiry as follows:

> With the citizen we are now little concerned, except to set his case apart as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens. Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection. [*Id.*]

Eisentrager thus recognized that American citizens held abroad in American custody can avail themselves of the writ of habeas corpus.

The Court's recent cases reaffirm this proposition. In *Rasul*, for example, eight Justices of this Court "explicitly agreed that American citizens held by American officials overseas could invoke habeas jurisdiction." *Munaf*, 482 F.2d at 585 (Randolph, J., concurring in the judgment). In that case, the Court observed that aliens held at the Guantanamo Bay Naval base in Cuba, "*no less than American citizens*, are entitled to invoke the federal courts' authority under § 2241." *Rasul*, 542 U.S. at 481 (emphasis added). The Court went on to explain that "[a]pplication of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus." *Id.*

The dissent did not take issue with the proposition that American citizens held outside the territorial United States could avail themselves of the writ of habeas corpus; it embraced this proposition as well. Justice Scalia, writing for himself as well as Chief Justice Rehnquist and Justice Thomas, noted that "[n]either party to the present case challenges the atextual extension of the habeas statute to United States citizens held beyond the territorial jurisdictions of the United States courts." *Id.* at 497 (Scalia, J. dissenting). He also recognized that there was a good reason for this: "[T]he position that United States citizens throughout the world may be entitled to habeas corpus rights * * * is *precisely* the position that this Court adopted in *Eisentrager*." *Id.* at 502 (Scalia, J. dissenting) (emphasis added).

Then there is of course *Hamdi*, decided during the very same term as *Rasul*, in which the Court specifically put this broad understanding of an American citizen's entitlement to the writ of habeas corpus to practice. *See* 542 U.S. at 531. Like petitioners in these cases, Hamdi, an American citizen, was detained as a result of our Nation's participation in multinational military operations in Afghanistan.

See 542 U.S. at 510; *see supra* at 17-19. But, as discussed above, in reviewing his habeas petition, not a single Justice found jurisdiction wanting. *See supra* at 17-19. Instead, the plurality "reaffirm[ed] * * * the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law." *Id.* at 531.

The Government is hard-pressed to explain how its multinational-force limitation can be squared with this Court's recognition in *Eisentrager*, *Rasul* and *Hamdi* that federal courts have jurisdiction to entertain writs of habeas corpus filed by Americans held in American custody to test the legality of their detention—regardless of whether their American jailers are participants in a multinational military enterprise. Judge Randolph, in his separate concurrence in *Munaf*, recognized as much: He explained that "[t]o extend *Hirota* to habeas petitions filed by American citizens not only would contradict *Eisentrager*," but would also contradict "the majority and dissenting opinions in *Rasul*." 482 F.3d at 585 (Randolph, J., concurring in the judgment). Even the majority in *Munaf* noted that this Court's decisions in *Hamdi* and *Rasul* "are grounds for questioning *Hirota*'s continued vitality." *Id.* at 585. This Court should reject the Government's asserted jurisdictional limitation now.

E. The Government's Rule Would Create Perverse Incentives To Detain American Citizens Under The Auspices Of Multinational Military Operations As A Way To Circumvent Judicial Review.

The upshot of the Government's asserted limitation on federal courts' habeas jurisdiction is that the Executive would have unbridled discretion to detain American citizens free of any judicial supervision so long as it acts under the auspices of a multinational arrangement. Such an incentive would have per-

verse consequences, not the least of which is that the Government would have available to it a ready-made way of circumventing the core holding of *Hamdi*.

The Court in *Hamdi* recognized the type of "perverse incentive[s]" that a jurisdictional rule like the one the Government wants here would trigger. *Hamdi*, 542 U.S. at 524 (plurality op.). There, the Court noted that a habeas rule that turned on where an American citizen is held would present "[m]ilitary authorities * * * the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield." *Id.* As a result, military authorities would be encouraged to "simply keep citizen-detainees abroad." *Id.*

The incentives created by the jurisdictional rule the Government proposes here are no less perverse. For the rule would encourage the Government to assert custody over American citizens under the auspices of multinational arrangements in order to obtain the sole discretion to determine whether the citizens are entitled to the most elemental right to challenge the lawfulness of their detention. The Executive would thus have at hand "nothing less than the unreviewable power to separate an American citizen from the most fundamental of his constitutional rights merely by choosing where he will be detained and who will detain him." *Abu Ali*, 350 F. Supp. 2d at 40. The constitutional obligations that the Executive owes to the citizens of this Nation effectively would be optional whenever it participated in multinational endeavors.

That result would be particularly troubling because it would offer the Government an expedient way to evade the rule of law this Court announced in *Hamdi*. If the Government could evade federal court habeas jurisdiction simply by invoking multinational authorization it would be under no obligation to provide people captured in multinational military

operations any due process of law, including the right to challenge the factual basis of their detention before a neutral decisionmaker. *See* 542 U.S. at 509, 535. *Hamdi* clearly intended to prevent that injustice.

F. The Government Is Wrong That The Separation-Of-Powers Doctrine Supports The Rule That It Draws From *Hirota*.

The Government argues that "[t]he restraint called for by *Hirota* is supported by fundamental separation-of-powers principles." Gov. Br. 23. Not so. The Government's view of separation of powers would actually collapse the Constitution's structural separation of powers by arrogating to the Executive power that is vested in the Judiciary. Concentrating that sort of power in the Executive would undermine the very aim of the structural separation of powers: to promote individual liberty. In any event, this Court has already rejected the same mistaken view of the separation of powers that the Government advances here.

1. The Executive's Commander-in-Chief power does not trump the Judiciary's protection of individual liberties, for "[a] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 542 U.S. at 536. Even during times of military conflict, the Constitution mandates a role not only for the Article II Commander-in-Chief but also for the Article III Judiciary: To evaluate the lawfulness of Executive detention in view of the fundamental individual liberty at stake. Thus, "the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining the delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Id.*

This judicial check on Executive authority was important to the Founders, who were rightly suspicious of an Executive vested with unbridled military power permitting it to detain citizens at will. As this Court has explained, the Founders "knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866). This deep distrust of Executive military power runs throughout the *Federalist Papers*. *See, e.g.*, *The Federalist No. 45* (Madison) (explaining that "the blessings of liberty" are jeopardized by "those military establishments which must gradually poison its very fountain"). As Justice Scalia has emphasized, no fewer than "10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime." *Hamdi*, 542 U.S. at 568 (Scalia, J., dissenting).

The writ of habeas corpus that the Founders enshrined in the Constitution is central to the Judiciary's ability to check the Executive: It stands as the procedural "bulwark" against Executive overreaching through abusive detentions. *The Federalist No. 84* (Hamilton). Thus, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been *strongest*." *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001) (emphasis added). Yet, it is in this very context—the review of the legality of detentions of American citizens by American jailers through the writ of habeas corpus—that the Government now claims absolutely *no* protections exist.

That belief is not supported by the Constitution's separation of powers; it is at war with the very purpose of that structural safeguard. The Constitution's separation of powers is designed to preserve liberty by creating checks and balances through divided enumerated powers. *See Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2800 (2006) ("Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid.") (Kennedy, J., concurring). It was indeed "the central judgment of the Framers of the constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989). Thus, "[t]he very core of the liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." *Hamdi*, 542 U.S. 554-555 (Scalia, J., dissenting).

The consolidation of power within the Executive Branch that the Government seeks would thus invert our constitutional system of checks and balances. To be clear: "[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge." *Hamdi*, 542 U.S. at 536-537 (plurality op.). That result would indeed invite the very abuses that the Founders so feared. *See id.* at 530 ("history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse"). As James Madison warned us, "[t]he accumulation of all powers legislative, executive and judicial, in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."

The Federalist No. 47 (Madison). Indeed, a world of unrestrained "[e]xecutive power to detain an individual" is undoubtedly "the hallmark of the totalitarian state." *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 723 (1990) (Stevens, J., dissenting). The Court should now deny the Executive such dangerous and unchecked power—again.

2. This Court recently considered and emphatically rejected the premise that separation-of-powers principles preclude Article III courts from entertaining writs of habeas corpus filed by American citizens to contest the legality of their detention during the present American-led global operation to combat terrorism. *See Hamdi*, 542 U.S. at 535-537; *Rasul*, 542 U.S. at 485 ("[T]he federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."). In *Hamdi*, the court entertained a writ of habeas corpus filed by an American citizen and went on to hold that enemy combatants held by the United States must be given a meaningful opportunity to contest the factual basis for their detention before a neutral decisionmaker. *See* 542 U.S. at 509, 535. In so holding, the Court "necessarily reject[ed] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances." *Id.* at 535.

The Court's justification for rejecting the Government's understanding of separation of powers was simple and clear: A view of separation of powers that "serves only to *condense* power into a single branch of government" is fundamentally "unreasonable." *Id.* at 536. (emphasis in original). Far from being a mechanism designed to consolidate power within a single Branch of government, the Court explained that the Constitution's division of labor among three Branches was designed to protect

individuals from the excesses of a single Branch: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, *it most assuredly envisions a role for all three branches when individual liberties are at stake.*" *Id.* (emphasis added).

As in *Hamdi*, the liberty interests at issue in these cases are "the most elemental of liberty interests—the interest in being free from physical detention by one's own government." *Id.* at 529. Accordingly, as the Court concluded there, "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here." *Id.* at 535. In these cases, the Court should reject once more the Government's vision of the Executive's constitutional role during wartime—*i.e.*, that the Executive alone is the competent constitutional actor in the arena of military detentions of American citizens.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals in No. 07-394 should be affirmed; the judgment of the Court of Appeals in No. 06-1666 should be reversed.

Respectfully submitted,

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